Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CORTEZ BYRD CHIPS, INC.,

Petitioner,

v.

BILL HARBERT CONSTRUCTION COMPANY,
A DIVISION OF BILL HARBERT INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN L. MAXEY II
JOHN F. HAWKINS
MAXEY, WANN, BEGLEY & FYKE PLLC
Post Office Box 3977
210 E. Capitol Street
Suite 1900
Jackson, MS 39207-3977
(601) 355-8855

DANIEL H. BROMBERG
(Counsel of Record)
ADAM CANDEUB
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939

Counsel for Petitioner Cortez Byrd Chips, Inc.

4678

QUESTION PRESENTED

Whether a suit to vacate an arbitration award may be brought in the district in which the events in the underlying dispute occurred.

RULE 29.6 STATEMENT

Petitioner Cortez Byrd Chips, Inc. is not the subsidiary of any other corporation and does not have interests in any non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Cortez Byrd Chips, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1a) is reported at 169 F.3d 693. The opinion of the district court denying petitioner's motion to transfer (App. 8a), the opinions confirming the arbitration award (App. 5a, 11a), and the judgment (App. 18a) are unreported.

JURISDICTION

The decision of the Eleventh Circuit was entered on March 9, 1999. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 9 of the Federal Arbitration Act provides in pertinent part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. § 9. Section 10 of the Act provides in pertinent part:

> the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . .

Id. § 10. Sections 9, 10 and 11 of the Federal Arbitration Act are reprinted in their entirety at App. 19a.

STATEMENT

This case presents a fundamental question concerning arbitration procedure that has deeply divided the courts of appeals: whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, requires actions to confirm, vacate or modify arbitration awards to be brought in the district in which those awards were made. In the decision below, the Eleventh Circuit held that petitioner could not bring an action to vacate an arbitration award in the district in which the underlying dispute arose — as the general venue statute permits, *see* 28 U.S.C. § 1391(a)(2) — because the arbitrators chose to conduct the arbitration where respondent's business is located. This decision squarely conflicts with the decisions of at least five other courts of appeals and deepens an already widespread split among the federal courts of appeals.

1. The Federal Arbitration Act was "designed to [reduce the] technicality, delay and expense" of litigation. H.R. Rep. No. 68-96, at 2 (1924). Accordingly, in addition to making arbitration agreements "valid, irrevocable, and enforceable" contracts, 9 U.S.C. § 2, the Act provides a streamlined procedure for enforcement of arbitration agreements. Specifically, the Act requires courts to stay judicial proceedings raising any issue referable to arbitration, *see id.* § 3, and authorizes them to compel arbitration through summary proceedings, *see id.* § 4. The Act also provides a means for appointing arbitrators and compelling the attendance of witnesses. *See id.* §§ 5, 7. Finally, and most pertinently here,

the Act provides standards for confirming, vacating or modifying awards made in arbitration and indicates that applications for such orders may be brought in the district where those awards were made. *See id.* §§ 9-11.

2. Petitioner Cortez Byrd Chips, Inc. operates a mill in Brookhaven, Mississippi that produces wood chips for use in the paper making industry. App. 1a; Answer at 3. Respondent Bill Harbert Construction Company is in the commercial construction business and has its principal place of business in Birmingham, Alabama. Complaint ¶ 1; Answer ¶ 1.

On October 16, 1995, petitioner hired respondent to install a prefabricated chip mill in Brookhaven. Answer at 3. The parties executed a form construction contract providing that petitioner would pay respondent $1,357,000 for installation of the mill within 30 weeks. Abbreviated Form of Agreement between Owner and Contractor at 2 (Answer, Ex. A). The contract also provided that any additions, deletions or modifications of the work required "shall be authorized by written Change Order signed by the Owner, Contractor and Architect, or by written Construction Change Directive signed by the Owner and Architect" and that "[t]he Contract Sum . . . shall be changed only by Change Order." *Id.* at 8. The contract is governed by Mississippi law and provides that any disputes between the parties "shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect." *Id.* at 7-8.

After the mill was installed, respondent sought an upward adjustment in the contract sum. Answer at 4. Petitioner denied any obligation to pay more than the original sum because the parties never executed a written change order as required by the contract. *Id.* at 5. When the parties failed to resolve this issue, respondent filed a demand for arbitration with the American Arbitration Association, which elected to arbitrate

the matter in Birmingham, Alabama, where respondent is located. App. 9a. During the arbitration proceedings, counsel for respondent admitted that no written change order was ever executed. Answer at 5. Nevertheless, on December 19, 1997, the arbitration panel awarded respondent an adjustment of $488,500 based upon "Change Order Number One," a calculation of seven different items plus tax and overhead. Award (Complaint, Ex. A at 1).

In response, petitioner applied in the United States District Court for the Southern District of Mississippi, the district in which it resides and the chip mill was installed, to vacate the arbitration award. App. 2a. Approximately one week later, respondent filed suit in the United States District Court for the Northern District of Alabama, where the arbitration was held, to confirm the award. App. 2a. When petitioner moved to dismiss, transfer or stay the subsequently filed action in Alabama, the court denied the motion. In an opinion issued on April 24, 1997, the court concluded that "[t]he PLACE of arbitration determines the jurisdiction of the court" and that it therefore had "*exclusive* authority to vacate, modify, or correct the award" of the arbitration conducted in its district. App. 10a. Although petitioner pointed out that the Fifth Circuit had recently rejected this conclusion in *Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914 (5th Cir. 1997), the district court held that it was bound by an earlier Fifth Circuit decision, *City of Naples v. Prepakt Concrete Co.*, 490 F.2d 182 (5th Cir. 1974), rendered before the creation of the Eleventh Circuit. App. 9a-10a.

Petitioner moved for leave to file an interlocutory appeal, and on May 18, 1998 respondent submitted a "renewed motion" to confirm the arbitration award. Two days later, treating the complaint as an initial motion to confirm and the counterclaims in petitioner's answer as a motion to vacate, the trial court denied the motion to vacate and held that the arbitration award should be enforced because the record was

"absent a valid ground for *vacatur* or modification." App. 12a, 16a-17a nn. 1-2, *see also* App. 6a (entering final judgment on ground that "no evidence proffered to support any attack on the award").

Unwilling to return to the trial court, in the court of appeals petitioner challenged the trial court's decision solely on the ground that venue under the Federal Arbitration Act is permissive and that the trial court below should have deferred to the Southern District of Mississippi where proceedings relating to the arbitration award were first filed. App. 2a. The Eleventh Circuit noted that there is "a significant split of authority in the U.S. courts of appeals as to whether [the Federal Arbitration Act's] venue provisions are permissive or mandatory" and that "[t]he Supreme Court has never resolved this conflict." App. 3a n. 3. Finding that it was bound to follow the Fifth Circuit's decisions prior to October 1, 1981, the court of appeals held that the Fifth Circuit's decision in *City of Naples*, not the later decision in *Sutter*, controlled and concluded that the Federal Arbitration Act "places venue exclusively within the district court in and for the district within which the arbitration award was made." App. 3a-4a.

REASONS FOR GRANTING THE WRIT

As this Court has repeatedly recognized, arbitration plays a crucial role in the efficient administration of justice. This case presents a fundamental question concerning the procedure for enforcing arbitration awards: whether the Federal Arbitration Act requires applications to confirm, vacate or modify arbitration awards to be brought in the district in which the awards were made. The courts of appeals are hopelessly divided on this important and recurring issue, and, as the decision below demonstrates, this conflict is deepening.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF AT LEAST FIVE OTHER FEDERAL COURTS OF APPEALS

In the decision below, the Eleventh Circuit recognized a "significant split of authority in the U.S. [c]ourts of appeals as to whether the [Federal Arbitration Act's] venue provisions are permissive or mandatory" and suggested that the Court's guidance was needed to resolve this conflict. App. 3a n.3. Other courts have similarly noted that "the circuits currently are split on the question." *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 192 (4th Cir.), *cert. denied*, 119 S. Ct. 178 (1998); see *also In re VMS Sec. Litig.*, 21 F.3d 139, 143 (7th Cir. 1994) (noting that "there is a sharp divergence of authority on this matter"). Commentators have recognized this conflict as well and called for this Court to resolve it. *See, e.g.*, 2 Thomas H. Oehmke, *Oehmke Commercial Arbitration* § 141:15 (rev. ed. 1998) (noting that "the federal circuits are divided as to whether a vacatur petition can only be filed where the award is made"); Note, *Mandatory Venue and Motions to Confirm or Vacate Under the Federal Arbitration Act*, 32 U.S.F.L.R. 629, 631 (1998) ("The United States Supreme Court should grant certiorari to the next eligible case and create a uniform rule for the circuits to follow.").[1]

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[1] *See also* Jay E. Grenig, *Alternative Dispute Resolution with Forms* § 20.2, at 357 (2d ed. 1998 Supp.) ("The circuits are divided as to whether these venue provisions in the Federal Arbitration Act are permissive and not mandatory."); Laurence J. Zielke, *Arbitrating Miller Act Claims and Problems in Enforcing An Award Under the Federal Arbitration Act*, 24 Pub. Cont. L.J. 401, 411 n.43 (1995) (noting that "the Circuits are divided" over whether Sections 9 and 10 provide permissive or mandatory venue); Note, *Venue for Motions to Confirm or Vacate Arbitration Awards Under the Federal Arbitration Act*, 57 Fordham L. Rev. 653, 654 (1989) ("A disagreement has developed among the courts as to the proper venue for motions brought pursuant to sections 9 and 10.").

The decision below conflicts with the decisions of at least five other courts of appeals. For example, in *In re VMS Securities Litigation*, 21 F.3d at 139, the Seventh Circuit considered whether a party to a securities class action in the Northern District of Illinois could move to vacate an arbitration award in that district on the ground that it was inconsistent with the class settlement. *See id.* at 141. When the other parties to the arbitration asserted that venue was improper because the arbitration took place outside the Northern District of Illinois, the court of appeals held that the venue was proper. *See id.* at 142-45. The Seventh Circuit reasoned that the language of Sections 9 and 10 does not explicitly restrict venue and that Congress "has usually employed more explicit language than" the permissive language in those sections when it intended to restrict venue to a particular court. *Id.* at 144. The court of appeals also found that treating Sections 9 and 10 as mandatory venue provisions would impose a "pointless and wasteful burden." *Id.* at 144-45. In particular, the Seventh Circuit observed that if Sections 9 and 10 were treated as mandatory, a court that already had jurisdiction over a controversy would "be prevented from proceeding with the matter to its conclusion," thereby compelling parties to "sue in another forum to vacate an award under § 10." *Id.* at 145.

The Fifth Circuit has also refused to find an exclusive venue for confirming and vacating arbitration awards. In *Sutter Corp. v. P & P Industries, Incorporated*, 125 F.3d 914 (5th Cir. 1997), the Western District of Oklahoma stayed proceedings before it pending arbitration. *See id.* at 916. After an arbitration in Dallas, the plaintiff moved to confirm the arbitration award in the Northern District of Texas, and the defendant moved to vacate in the Western District of Oklahoma. *See id.* When the Texas court refused to transfer the case back to Oklahoma where the case originated on the ground that Oklahoma was not a proper venue, the Fifth Circuit reversed. *See id.* at 919-20. Distinguishing its earlier

decision in *Prepakt Concrete*, the Fifth Circuit "agree[d] with the Seventh Circuit's reasoning in *In re VMS Securities Litigation*." *Id.* at 920. It therefore held that "[v]enue under § 9 is not mandatory" and that "venue under § 10 is . . . permissive." *Id.* at 919-20.

After the *Sutter* case was remanded and transferred to Oklahoma, the Tenth Circuit reached the same conclusion. In *P&P Industries, Inc. v. Sutter Corp.*, No. 98-6358, 1999 WL 339699, at *8 (10th Cir. May 28, 1999), the Tenth Circuit held that "the Western District of Oklahoma was authorized by § 9 to confirm the arbitration award, even though the award was handed down in Dallas, Texas." Considering the question *de novo*, the Tenth Circuit found that interpreting venue under the Federal Arbitration Act to be exclusive would "lead to wasteful allocation of judicial resources because district courts which otherwise have jurisdiction over arbitration cases would often be required to dismiss them." *Id.* at 7. The court of appeals also found that "Congress would have used stronger language than 'such application may be made' or 'may apply' if the intention was to restrict the power of a federal court in Arbitration Act cases." *Id.* (quotation omitted).

The Second and Fourth Circuits have likewise held that venue under the Federal Arbitration Act is permissive. *See Apex Plumbing*, 142 F.3d at 192 (holding that "section nine of the FAA confers permissive, rather than mandatory, venue upon district courts in and for the districts in which an arbitration award was made"); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985) (holding that "[o]nce a federal court has subject-matter jurisdiction over an action, it may confirm an arbitration award even though it was not the district where the award was granted").

The decision below cannot be reconciled with these rulings. In this case, as in *In re VMS Securities Litigation* and *Sutter*, the parties to an arbitration applied to confirm and vacate in

different courts: respondent applied to confirm the award in Alabama, in the judicial district where the arbitration took place, and petitioner applied to vacate that same award in Mississippi in the judicial district in which the underlying dispute occurred. App. 1a-2a. Relying upon the *Prepakt Concrete* decision rejected by the Fifth Circuit in *Sutter*, the decision below held that the Federal Arbitration Act's "venue provision places venue exclusively within the district court in and for the district within which the award was made." App. 3a. Moreover, in so doing, the court of appeals expressly refused to follow the "permissive" interpretation adopted by the Fifth Circuit in *Sutter*, which it noted that the Seventh Circuit in *VMS Securities Litigation* and the Second Circuit in *Smiga* had adopted. App. 3a & n.3. Thus, the conflict between the decision below and the decisions of the Second, Fourth, Fifth, Seventh and Tenth Circuits is clear.

As the decision below recognized, its interpretation of the Federal Arbitration Act is consistent with the Sixth Circuit's ruling in *Island Creek Coal Sales Co. v. City of Gainesville, Florida*, 729 F.2d 1046 (6th Cir. 1984). In that case, a party to an arbitration conducted in Kentucky sought to vacate the arbitrator's award in a Florida district court. *See* 729 F.2d at 1047-48. The other party to the arbitration applied to confirm the award in a Kentucky district court. *Id.* at 1049-50. When the Kentucky court refused to transfer the action, the Sixth Circuit affirmed on the ground that the arbitration award was made in Kentucky. *See id.* Relying on *Prepakt Concrete*, the Sixth Circuit concluded that section 9 gives the district court in the district where an arbitration award was made "exclusive jurisdiction to review the arbitrators' . . . order." *Id.* at 1050.

The Ninth Circuit has also held that the Federal Arbitration Act restricts where applications to vacate an arbitration award may be made. In *United States ex rel. Chicago Bridge & Iron Co. v. Ets-Hokin Corp.*, 397 F.2d 935 (9th Cir. 1968), a subcontractor filed suit against its prime contractor in the

United States District Court for the District of Arizona, which stayed proceedings pending arbitration. *See id.* at 936. After arbitration in San Francisco, the subcontractor moved to vacate the award in Arizona district court. *See id.* at 937. The Ninth Circuit held that the Arizona court had no jurisdiction under section 10 and should have deferred to confirmation proceedings brought by the prime contractor in California. *See id.* Although the Ninth Circuit now recognizes that Sections 9 and 10 are not jurisdictional, it continues to treat venue under the Federal Arbitration Act as exclusive. *See, e.g., Sunshine Beauty Supplies, Inc. v. United States District Court,* 872 F.2d 310, 312 (9th Cir. 1989) (holding that arbitration awards may only be reviewed in the district in which the awards were made).

In sum, eight circuits have considered whether venue under the Federal Arbitration Act is mandatory. These courts are now split, five in favor and three against. The conflict is long-standing: the courts of appeals have been in conflict since at least 1985. *Compare Smiga*, 766 F.2d at 706 (holding venue permissive) *with Ets-Hokin*, 397 F.2d at 939 (holding venue mandatory). Moreover, there is no sign that this conflict is working itself out. To the contrary, in the last three months the Tenth and Eleventh Circuits have issued squarely conflicting opinions. *Compare P&P Industries v. Sutter*, 1999 WL 339699, at *6-*7 (rejecting the interpretation adopted in the decision below) *with* App 3a n.3. Consequently, this Court's intervention is clearly warranted.

II. THE DECISION BELOW WAS WRONGLY DECIDED

More than thirty years ago in *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966), this Court considered the relationship between special venue statutes and the general venue statute. Noting that Congress amended the general revenue sate to expand the number of available venues, this Court held that

special venue statutes should be interpreted in light of the general venue statute's "liberalizing purpose . . . at least in the absence of contrary restrictive indications in any such statute." 384 U.S. at 204-05. Accordingly, special venue statutes have generally "been considered to be non-exclusive if the statute was originally intended to expand rather than contract venue." 17 Linda S. Mullenix & Georgene M. Vairo, *Moore's Federal Practice* § 110.01[3][b], at 110-16 (3d ed. 1999). The decision below ignores this basic principle and instead reads into the Federal Arbitration Act an inflexible rule that undermines the very purposes of the Act.

Nothing in the text of the Federal Arbitration Act suggests that Congress intended to prevent parties from seeking to confirm or vacate arbitration awards in districts in which "a substantial part of the events or omissions giving rise to [respondent's] claim occurred." 28 U.S.C. § 1391(a)(2). Where Congress has intended to restrict venue to particular districts, it has normally given clear and explicit instructions. *See, e.g.*, 28 U.S.C. § 1398 (providing that actions to enforce Interstate Commerce Commission orders "*shall* be brought *only* in a judicial district in which any of the parties bringing the action resides or has its principal office" (emphasis added)).[2] The Federal Arbitration Act does not contain any such

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[2] *See also* 42 U.S.C. § 7604(c)(1) (providing certain actions under the Clean Air Act "may be brought *only* in the judicial district in which such source is located) (emphasis added); 40 U.S.C. § 270b(b) (providing that actions under the Miller Act "*shall* be brought . . . in the United States District Court for any district in which the contract was to be performed and executed *and not elsewhere*") (emphasis added); 28 U.S.C. § 1403 (eminent domain actions by the United States "*shall* be brought in the district court of the district where the land is located") (emphasis added); *id.* § 1402(a) (FTCA claims "may be prosecuted *only*" in specified venues) (emphasis added); *id.* § 1399 (providing that partition actions involving the United States "may be brought *only* in the judicial district where such lands are located) (emphasis added).

instruction. To the contrary, section 10 states that the "United States court in and for the district wherein the award was made *may* make an order vacating the award upon the application of any party to the arbitration," 9 U.S.C. § 10 (emphasis added), and Section 9 provides that "[i]f no court is specified in the agreement of the parties, then such application *may* be made" in the same district. *Id.* § 9 (emphasis added). This language is, of course, permissive, not mandatory, in nature, *see, e.g.*, *Barlow v. Collins*, 397 U.S. 159, 166 (1970) (recognizing the word "may" to be a "permissive term"); *see also Apex Plumbing Supply*, 142 F.3d at 192 ("The word 'may' in a statute normally confers a discretionary power, not a mandatory power." (quotation omitted)), and therefore offers little reason to think that Congress intended venue under the Federal Arbitration Act to be exclusive.

Nor does either the legislative history or the structure of the Act suggest such an intent. The legislative history is silent on the subject of venue, *see* Note, *Venue for Motions to Confirm or Vacate Arbitration Awards Under the Federal Arbitration Act*, 57 Fordham L. Rev. 653, 658 (1989), and the structure of the Act conflicts with any suggestion that Congress intended to restrict venue in the federal courts to a single district. As this Court has observed, the Federal Arbitration Act leaves "enforcement of the Act . . . in large part to the state courts." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32 (1983); *see also id.* (noting that the Act does not create federal subject matter jurisdiction). The Act does not dictate where actions to confirm or vacate an arbitration award in state court may be brought. If, however, the Act permits actions to confirm or vacate in state court to be brought where the events underlying the dispute occurred, there is little reason to believe that Congress intended to prohibit federal courts in those jurisdictions from hearing such claims.

Limiting the venue for reviewing arbitration awards would also undermine an important goal of the Federal Arbitration Act. One of the stated purposes of the Act is to provide a simple procedure that will "[reduce the] the technicality, delay, and expense to a minimum." H.R. Rep. No. 68-96, at 2. Permitting parties to bring actions to confirm or vacate in the district in which an arbitration award was made serves this goal because that district is normally a convenient venue. *See, e.g.*, *Motion Picture Laboratory v. McGregor & Werner*, 804 F.2d 16, 18 (2d Cir. 1986) (noting that "the parties have already indicated that the location is mutually convenient to settle their disputes") (quotation omitted). The district in which the arbitration award was made is not, however, always the most convenient forum. The location in which an arbitration is conducted may, for example, be determined by the convenience and preference of the arbitrator, not the parties.[3] As a consequence, restricting venue for actions to confirm or vacate arbitration awards to the districts in which those awards were made would in many cases prevent parties from litigating in the most convenient forum, thereby undermining the "statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone*, 460 U.S. at 23.

A rigid rule requiring all suits seeking to confirm, vacate or modify arbitration awards to be brought in the district where the award was made would also interfere with the efficient administration of justice in some instances. As the *VMS Securities Litigation* and *Sutter* cases demonstrate, *see supra* pp. 7-8, arbitrations frequently relate to pending actions conducted outside of the district in which the arbitration award

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[3] *See, e.g.*, *Sutter*, 125 F.3d at 916 (providing for arbitration "at the office of the [American Arbitration] Association nearest the principal place of business" of the parties); *Naples*, 490 F.2d at 184 (noting that the parties "agree[d] . . . to abide. . . . by the A.A.A.'s decision as to arbitration locale in cases of dispute").

is made. If the Federal Arbitration Act were interpreted to limit venue to the jurisdiction in which the award was made, the parties in those cases would be forced to file a new suit before a new judge who would have to familiarize himself or herself with the case, a "pointless and wasteful burden." *In re VMS Sec. Litig.*, 21 F.3d at 144-45.

As this Court has interpreted the Federal Arbitration Act to avoid "pointless and wasteful burden[s] on the supposedly summary and speedy procedures prescribed in the Arbitration Act," *Moses H. Cone*, 460 U.S. at 27; *see also Allied-Bruce Terminex Co. v. Dobson*, 513 U.S. 265, 280-81 (1995) (construing Section 2 of the FAA in light of the need for convenient and efficient resolution of issues relating to arbitration), the Act should not be interpreted to impose a mandatory and exclusive venue requirement. The venue provisions read into the Act should instead be interpreted to be permissive so that parties have the flexibility to bring actions to confirm or vacate arbitration awards outside the district in which that award was made in.

III. THE DECISION BELOW RAISES AN IMPORTANT AND RECURRING ISSUE

As the recent rash of court of appeals opinions addressing the issue demonstrates, *see supra* pp. 8-10 (discussing four opinions issued in the last two years), the question whether arbitration awards may be reviewed outside the district in which the award was made arises frequently. In recent years, as the number of cases brought in the federal courts has exploded, *see, e.g.*, Richard A. Posner, *The Federal Courts: Crisis and Reform* 63-64, 210 (1985), the number of disputes submitted to arbitration has risen sharply as well. *See, e.g.*, American Arbitration Association, *Statistical Report* at 1-2 (1998) (reporting 100,000 filings in 1998); *1997 NASD Annual Report*, <http://www.nasd.com/docs/97_annual.pdf> (visited June 2, 1999) (reporting 5,997 filings in 1997). Indeed, for

commercial disputes, arbitration may now be the primary method of dispute resolution. *See e.g.*, Steven A. Meyerowitz, *The Arbitration Alternative*, A.B.A. J., Feb. 1985, at 78, 79 (stating that "'more commercial claims [in the United States] are arbitrated than tried before a jury'"). It should come as no surprise then that the question of where an arbitration award may be enforced or challenged has come up dozens of times in the last decade.[4]

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[4] *See, e.g., P&P Indus., Inc. v. Sutter*, No. 98-6358, at *4-*8; *Apex Plumbing*, 142 F.3d at 192; *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1468 & n.4 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 105 (1998); *Lander Co., v. MMP Investments, Inc.*, 107 F.3d 476, 480-81 (7th Cir.), *cert. denied*, 118 S. Ct. 55 (1997); *Sutter*, 125 F.3d at 918-20; *In re VMS Sec. Litig.*, 21 F.3d at 145; *Sunshine Beauty Supplies*, 872 F.2d at 311-12; *Island Creek Coal*, 729 F.2d at 1050; *Prozina Shipping Co. Ltd. v. Elizabeth-Newark Shipping Inc.*, No. 98 Civ. 5834(LMM), 1999 WL 203356, at *2-3 (S.D.N.Y. Apr. 12, 1999); *International Lithography Corp. v. Curro*, No. Civ. A. 96-7446, 1997 WL 633571, at *2 (E.D. Pa. Oct. 6, 1997); *Lindell v. Waddell & Reed, Inc.*, 962 F. Supp. 103, 105 n.3 (W.D. Mich. 1997); *Meadows Indemnity Co., Ltd. v. Arkwright Mutual Ins. Co.*, No. Misc. 88-0600, 1996 WL 557513, at *3 n.7 (E.D. Pa. Sept. 30, 1996); *Delta Dental of Rhode Island v. Dental Serv. of Mass.*, 918 F. Supp. 46, 48 (D.R.I. 1996); *In re Arbitration Between Lauritzen Kosan Tankers and Chemical Trading, Inc.*, 903 F. Supp. 635, 636-37 (S.D.N.Y. 1995); *Denver & Rio Grande W. R.R. v. Union Pac. R.R.*, 868 F. Supp. 1244, 1249-50 (D. Kan. 1994), *aff'd*, 119 F.3d 847 (10th Cir. 1997); *Dombrowski v. Swiftships, Inc.*, 864 F. Supp. 1242, 1252 (S.D. Fla. 1994); *United States ex rel. Skip Kirchdorfer, Inc. v. Aegis/Zublin Joint Venture*, 869 F. Supp. 387, 390-91 (E.D. Va. 1994); *Lopresti v. Electro-Films, Inc.*, Civ. A. No. 92-2965, 1992 WL 309634, at *6 (E.D. Pa. Oct. 20, 1992); *Tesoro Petroleum Corp. v. Asamera Ltd.*, 798 F. Supp. 400, 404-05 (W.D. Tex. 1992); *Alexander Ins. Ltd. v. Executive Life Ins. Co. of New York*, No. 90 Civ. 8268 (KMW), 1991 WL 150224, at *2 (S.D.N.Y. July 29, 1991); *Pennsylvania Data Entry, Inc. v. Nixdorf Computer Corp.*, 762 F. Supp. 96, 101 (E.D. Pa. 1990); *Soo Line R.R. v. Chicago & N. W. Transp. Co.*, 737 F. Supp. 68, 69 (D. Minn. 1990); *Elgart v. Sono-Tek Corp.*, Civ. A. No. 88-7539, 1989 WL 136280, at *3 (E.D. Pa. Nov. 9, 1989).

The conflict among circuits over this question creates a danger of duplicative proceedings and contradictory rulings. As the *Sutter* case demonstrates, in some circumstances, parties contending that arbitration awards may only be reviewed in the district in which the award get two bites at the apple. *See supra* pp. 8-9. Although the Fifth and Tenth Circuits agreed in the *Sutter* cases that venue under the Federal Arbitration Act is permissive rather than mandatory, *see id.*, in other cases there may be conflicting rulings. Indeed, in this case, if the Southern District of Mississippi had acted promptly on petitioner's motion to vacate, it would have been compelled by Fifth Circuit precedent to reach a conclusion directly opposite from the Eleventh Circuit's below and perhaps proceed along parallel tracks. *See Sutter*, 125 F.3d at 918-20. Thus, the need for a uniform national rule is clear.

The question presented in this case also affects the costs of challenging or enforcing an arbitration award, and because the relatively low cost of arbitration compared to litigation is one of arbitration's chief attractions, the question presented has important implications for the administration of justice and the federal court's ability to satisfy its work load. For this reason as well, the frequently-recurring question presented here warrants this Court's attention.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

JOHN L. MAXEY II
JOHN F. HAWKINS
MAXEY, WANN, BEGLEY & FYKE PLLC
Post Office Box 3977
210 E. Capitol Street
Suite 1900
Jackson, MS 39207-3977
(601) 355-8855

DANIEL H. BROMBERG
(Counsel of Record)
ADAM CANDEUB
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939

Counsel for Petitioner
Cortez Byrd Chips, Inc.

June 7, 1999

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BILL HARBERT CONSTRUCTION COMPANY,
A DIVISION OF BILL HARBERT
INTERNATIONAL, INC.,
Plaintiff-Counter-Defendant, Appellee,

v.

CORTEZ BYRD CHIPS, INC., Defendant-
Counter-Claimant, Appellant.

No. 98-6404

March 9, 1999

Before TJOFLAT and EDMONDSON, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

This case arises out of a dispute over an arbitration award that was confirmed by the district court for the Northern District of Alabama. The sole issue on appeal is whether venue was proper in that court. We affirm.

Plaintiff, Bill Harbert Construction Company, entered into an agreement to build a wood chip mill for defendant, Cortez Byrd Chips, Inc., in Brookhaven, Mississippi. The agreement provided for arbitration of "[a]ll claims or disputes between the contractor and the owner arising out of or relating to the contract, or the breach thereof. . . ." While the agreement expressly stated that Mississippi law was applicable, it did not provide for jurisdiction in a particular court, nor did it specify venue for confirmation or vacatur/modification of an award. It merely stated that "judgment may be entered upon [the

arbitration award] in accordance with applicable law in any court having jurisdiction thereof."

After a dispute arose between the two, Harbert Construction filed a demand for arbitration with the Atlanta, Georgia office of the American Arbitration Association. An arbitration panel conducted an arbitration proceeding in Birmingham, Alabama from Tuesday, November 18, 1997 through Friday, November 21, 1997. On December 20, 1997, the arbitrators rendered their award in favor of Harbert Construction.

Byrd filed a complaint to vacate and/or modify the arbitration award in the United States District Court for the Southern District of Mississippi on January 13, 1998. On January 20, 1998, Harbert filed this action in the Northern District of Alabama to confirm the arbitration award on January 20, 1998. Byrd filed an answer, counterclaim and motion to dismiss, transfer or stay this action. The district court denied Byrd's motion, holding that venue was properly in the Alabama district court, and entered final judgment in favor of Harbert for the net sum of $274,256.90 plus costs and interest.

On appeal, Byrd alleges the district court erred in denying his motion because according to a recent Fifth Circuit decision, venue is permissive and is proper in the district court in Mississippi because he filed his action there first. We review the venue question *de novo*.

The Federal Arbitration Act states that a motion to confirm an arbitration award[1] or to vacate an award[2] "may" be made to

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[1] If no court is specified in the arbitration agreement, an application for an order confirming the award "may be made to the United States court in and for the district within which such award was made." 9 U.S.C. § 9.

[2] Under certain circumstances, "the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration. . . ." 9 U.S.C. § 10.

the United States court in and for the district within which such award was made. 9 U.S.C. §§ 9, 10.

In determining the propriety of its venue, the district court relied on our decision in *Naples v. Prepakt Concrete Co.*, 490 F.2d 182, 184 (5th Cir.), *cert. denied*, 419 U.S. 843, 95 S. Ct. 76, 42 L Ed.2d 71 (1974). In *Naples*, this Court held that the Act's venue provision places venue exclusively within the district court in and for the district within which the arbitration award was made. Byrd asks us to follow instead the holding of a more recent Fifth Circuit decision, *Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914 (5th Cir. 1997), in which that court held venue under §§ 9 and 10 to be permissive.[3] Although the *Sutter Corp.* opinion indicated that *Naples v. Prepakt Concrete Co.* did not decide this issue, it appears to us that it controls this panel's decision:

> [I]n view of § 9's command, and for reasons of judicial restraint and comity, the district judge [in Florida] should have declined to enjoin the confirmation proceedings in the Ohio district court [district within which the award was made]. *See Naples*, 490 F.2d at 184.

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[3] There is a significant split of authority in the U.S. Courts of appeal as to whether these venue provisions are permissive or mandatory. *See, e.g., In re VMS Securities Litigation*, 21 F.3d 139 (7th Cir. 1994) (§ 10 permissive); *Sunshine Beauty Supplies, Inc. v. United States District Court for Central Dist. of Cal.*, 872 F.2d 310 (9th Cir. 1989) (§ 9 mandatory); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698 (2d Cir. 1985)(§ 9 permissive), *cert. denied*, 475 U.S. 1067, 106 S. Ct. 1381, 89 L. Ed.2d 607 (1986); *Central Valley Typographical Union No. 46 v. McClatchy Newspapers*, 762 F.2d 741 (9th Cir. 1985) (§ 10 mandatory); *Island Creek Coal Sales Co. v. City of Gainesville, Florida*, 729 F.2d 1046 (6th Cir. 1984) (§ 9 mandatory). The Supreme Court has never resolved this conflict.

We are bound to follow this Court's prior precedent. Fifth Circuit decisions prior to October 1, 1981 are binding precedent on this Court, but not after that date 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981). Accordingly, the district court's decision is due to be affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	CIVIL ACTION NO. 98-G-0117-S
Plaintiff,	)	
v.	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

The above-styled action to enforce the arbitration award was filed January 20, 1998. In its complaint Bill Harbert Construction Company [hereinafter Harbert] asked the court to enter an order confirming the arbitration panel's award and to enter judgment for the net sum of $274,256.90 ($1,845,000.00 — adjusted contract amount plus $2,500.00 reimbursement less $1,573,243.10 payment), plus interest, costs, and expenses. A copy of the award of the arbitrators was attached to the complaint.

Defendant's answer contained a counterclaim by which it asked the court to vacate the portion of the arbitration award pertaining to the payment of damages and all supporting analysis. At its April 17, 1998, motion docket the court heard the defendant's motion to dismiss, transfer or stay this action pending resolution by the District Court for the Southern

District of Mississippi. In its order and memorandum opinion of April 24, 1998, the court denied the motion, holding that the place of arbitration determines the jurisdiction of the court. "Consistent with the decision in *Prepakt*,[1] plus adoption of the reasoning of the Ninth Circuit in *Central Valley*,[2] this court holds that it has *exclusive* authority to adjudicate the action to vacate, modify, or correct the award."[3]

By order and memorandum opinion of May 20, 1998, the court held that since the arbitration properly took place in Alabama, following *Booth v. Hume Pub., Inc.*, 902 F.2d 925 (11th Cir. 1990), the motion to enforce the arbitration award was granted. By the same order and opinion the court denied defendant's motion to file an interlocutory appeal from its April 24, 1998, order.

By orders and memorandum opinions of April 24, 1998, and May 20, 1998, the court effectively disposed of defendant's counterclaim. A copy of those orders and opinions are attached hereto and are incorporated as part of this memorandum opinion.

Since there has been no specific ground of attack pleaded and no evidence proffered to support any attack on the award, the court holds that plaintiff is due final judgement as a matter of law, defendant's actions only seeking delay of the inevitable.

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[1] *City of Naples v. Prepakt Concrete Company*, 490 F.2d 182 (5th Cir. 1974), adopted as binding precedent in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[2] *Central Valley Typographical Union No. 46 v. McClathey Newspapers*, 762 F.2d 741 (9th Cir. 1985).

[3] Page 3 of the April 24, 1998, memorandum opinion.

An order consistent with this opinion is being entered contemporaneously herewith.

DONE and ORDERED this 1st day of June 1998.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	CIVIL ACTION NO. 98-G-0117-S
Plaintiff,	)	
v.	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

This motion came before the court at its April 17, 1998, motion docket. Both sides briefed and argued the motion well, and the court took the motion under advisement. Having considered the motion, pleadings, submissions and arguments of counsel, and the applicable law, the court is of the opinion the motion should be denied.

The issue before the court is whether the district court where an arbitration award was made has *exclusive* or *permissive* authority to adjudicate an action to vacate, modify, or correct the award pursuant to 9 U.S.C. § 9.

In 1974, the Fifth Circuit, in *City of Naples v. Prepakt Concrete Company*, 490 F.2d 182 (5th Cir. 1974)[1] held that by agreeing to "an arm's length commercial contract to abide by the A.A.A.'s decision as to arbitration locale . . . , the City had waived its right to oppose an Ohio locale." 490 F.2d at 184. The court held that arbitration had taken place in Ohio and therefore, "under § 9, the Ohio District Court was the proper court to confirm, vacate, modify, or correct the arbitration award." *Id.* Although the case dealt with the issue of waiver of the right to object to locale,[2] the court also held that the locale of the arbitration determined the authority of the court to decide issues pertaining to the arbitration award. The last holding controls the decision here.

Since defendant filed in the district court in Mississippi prior to plaintiff's filing the instant action here defendant has urged the court to follow the decision in *Sutter Corp. v. P&P Industries, Inc.*, 125 F.3d 914 (5th Cir. 1997), which held the "'first to file rule' not only determines which court may decide the merits of substantially similar cases, but also establishes which court may decide whether the second suit filed must be dismissed, stayed or transferred and consolidated." 125 F.3d at 920. This holding is inconsistent with the holding in *Prepakt* and with that of the Ninth Circuit in *Central Valley Typographical Union No. 46 v. McClathey Newspapers*, 762 F.2d 741, 744 (9th Cir. 1985) (placing primary reliance on where the arbitration was held).

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[1] The Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[2] In *Prepakt* the contract specified no specific place. The parties designated a method for choosing a place.

In the instant case, the underlying arbitration was conducted within the Northern District of Alabama. The arbitrators had the right to decide where to arbitrate and arbitrated in this district. Other than the holding in *Prepakt*, previously discussed, our circuit has not addressed the issue of whether the language of 9 U.S.C. § 9 conveys exclusive or permissive authority upon the district court in which the arbitration was heard. Even so, it is immaterial that the Eleventh Circuit has not decided whether permissive or mandatory jurisdiction applies: the old Fifth Circuit has. The PLACE of arbitration determines the jurisdiction of the court. By *Bonner* this court is bound to the situs of the arbitration.

Consistent with the decision in *Prepakt*, plus adoption of the reasoning of the Ninth Circuit in *Central Valley*, this court holds that it has *exclusive* authority to adjudicate the action to vacate, modify, or correct the award. Accordingly, the motion of the defendant to dismiss, transfer, or stay this action pending resolution by the United States District Court for the Southern District of Mississippi of Byrd's complaint to vacate and/or modify the arbitration award is denied.

An order consistent with this opinion is being entered contemporaneously herewith.

DONE and ORDERED this 24th day of April 1998.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATED DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	CIVIL ACTION NO. 98-G-0117-S
Plaintiff,	)	
v.	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

The court has been asked to grant defendant's motion for an interlocutory appeal from its order of April 24, 1998, at which time the court ruled it had *exclusive* authority to adjudicate the action to vacate, modify, or correct the arbitration award. *City of Naples v. Prepakt Concrete Company*, 490 F.2d 182 (5th Cir. 1974);[1] *Central Valley Typographical Union No.46 v. McClathy Newspapers*, 762 F.2d 741, 744 (9th Cir. 1985). The court held that it was immaterial that the Eleventh Circuit has not decided whether permissive or mandatory jurisdiction applies since the old Fifth Circuit has. By *Bonner* this court is bound to the situs of the arbitration. There being no legitimate

[1] The Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

difference of opinion between the old Fifth and Eleventh Circuits as to controlling law, the defendant's motion for interlocutory appeal is denied.

Since the arbitration properly took place here, this court has jurisdiction to consider vacating or affirming the arbitration award. As stated in *Booth v. Hume Pub., Inc.*, 902 F.2d 925, 932 (11th Cir. 1990), the Federal Arbitration Act expresses a presumption that arbitration awards will be confirmed by referring to the following words of the statute:

> Section 9 of the Act provides that if the parties have agreed to judicial confirmation of the award, then '*the court must grant such an order* [confirming the award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.' 9 U.S.C. § 9 (1970) (emphasis added).

The arbitration award has not been vacated, modified, or corrected. The record being absent a valid ground for *vacatur* or modification,[2] and the motions having been fully briefed,[3] the arbitration award is due to be affirmed.

For the reasons set forth above the court holds the following:

1) the motion to grant an interlocutory appeal is denied;

2) the motion to vacate the arbitration award is denied; and

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[2] Defendant did not articulate a single legal ground pursuant to 9 U.S.C. § 10 by which the arbitration can be vacated (other than to plead, without evidentiary support, a "laundry list" of grounds in a purely conclusory manner).

[3] "[T]he district court need not conduct a full hearing on a motion to vacate or confirm; such motions may be decided on the papers without oral testimony." *Booth*, 902 F.2d at 932.

3) The motion to enforce the arbitration award is granted.

An order consistent with this opinion is being entered contemporaneously herewith.

DONE and ORDERED this 20th day of May 1998.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	CIVIL ACTION NO. 98-G-0117-S
Plaintiff,	)	
v.	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

ORDER

This cause came before the court at its regularly scheduled motion docket of April 17, 1998, on the motion of defendant Cortez Byrd Chips, Inc. to dismiss, transfer, or stay this action pending resolution by the United States District Court for the Southern District of Mississippi of Byrd's complaint to vacate and/or modify the arbitration award. Having considered the motion, the pleadings, the submissions and arguments of counsel, and the applicable law, the court is of the opinion the motion should be denied. Accordingly, consistent with the memorandum opinion being entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the motion of defendant Cortez Byrd Chips, Inc. to dismiss, transfer, or stay this action pending resolution by the United States District Court for the Southern District of Mississippi of Byrd's

complaint to vacate and/or modify the arbitration award be and it hereby is DENIED.

DONE and ORDERED this 24th day of April 1998.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	CIVIL ACTION NO. 98-G-0117-S
Plaintiff,	)	
v.	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

ORDER

This cause comes before the court on the following motions:

1) Motion of defendant Cortez Byrd Chips, Inc. to file an interlocutory appeal from this court's order dated April 24, 1998;

2) Motion of plaintiff Bill Harbert Construction Company to confirm the arbitration award;[1]

3) Plaintiff's renewed motion to confirm the arbitration award; and

[1] The motion is contained within the January 20, 1998, complaint. Although the motion is not properly filed as a motion, the renewed motion places it before the court.

4) Motion of defendant Cortez Byrd Chips, Inc. to vacate the arbitration award.[2]

Having considered the motions, the pleadings, and the arguments of counsel, the court is of the opinion that the motion to file the interlocutory appeal should be denied, the motion for *vacatur* should be denied, and the arbitration award should be enforced. Accordingly, consistent with the memorandum opinion being entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the motion of defendant Cortez Byrd Chips, Inc. to file an interlocutory appeal from this court's order dated April 24, 1998, be and it hereby is DENIED. It is

FURTHER ORDERED, ADJUDGED and DECREED that the motion of plaintiff Bill Harbert Construction Company to confirm the arbitration award be and it hereby is GRANTED. It is

FURTHER ORDERED, ADJUDGED and DECREED that the motion of defendant Cortez Byrd Chips, Inc. to vacate the arbitration award be and it hereby is DENIED.

DONE and ORDERED this 20th day of May 1998.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

[2] Although not properly filed as a motion, this motion appears in defendant's answer and counterclaim, and the court has taken it as a motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	CIVIL ACTION NO. 98-G-0117-S
Plaintiff,	)	
v.	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

FINAL JUDGMENT

Pursuant to the memorandum opinion being entered contemporaneously herewith, it is hereby ORDERED that FINAL JUDGMENT be entered in favor of plaintiff for the net sum of $274,256.90 ($1,845,000.00 — adjusted contract amount plus $2,500.00 reimbursement less $1,573,243.10 payment), plus interest in the amount of $2,542.70, plus costs in the amount of $150.00 for a total of $276,949.60.

DONE and ORDERED this 1st day of June 1998.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

RELEVANT STATUTES

TITLE 9. ARBITRATION
CHAPTER 1 — GENERAL PROVISIONS

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.